Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1249

JEAN L. WERNET,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

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JEAN L. WERNET,
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STATE OF MINNESOTA,
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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the Judgment and Order of the Supreme Court of Minnesota, entered on October 24, 1978, denying Appellant's Petition for permission to appeal to the Minnesota Supreme Court from the Hennepin County District Court's Order, dated July 31, 1978, affirming Appellant's conviction in Hennepin County Municipal Court for operating a motion picture theater without a license, in violation of Minneapolis Code of Ordinances Chapter 367. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Order and Memorandum of the Hennepin County Municipal Court, filed September 22, 1976, denying Appellant's motion to dismiss the criminal complaint against her, based upon the unconstitutionality of the licensing ordinance, is not reported, and is set forth in the Appendix, *infra*, Appendix 1a-9a. The Order and Memorandum of the Hennepin County District Court, entered July 31, 1978, affirming Appellant's conviction in Hennepin County Municipal Court, is also not reported, and is set forth in the Appendix, *infra*, at 10a-15a. The Order of the Minnesota Supreme Court, entered October 24, 1978, denying Appellant's petition for permission to appeal from the Order affirming her conviction, is also not reported and is set forth in the Appendix at 16a.

JURISDICTION

The Order and Judgment of the Minnesota Supreme Court were entered on October 24, 1978, and Notice of Appeal was filed in that Court and in the Hennepin County Municipal Court[1] on January 17, 1979 (Appendix, *infra*, at 17a-18a. The jurisdiction of the Supreme Court to review this decision on appeal is conferred by 28 U.S.C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the Judgment on appeal in this case: *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Poulos v. State of New Hampshire*, 345 U.S. 395 (1953); *Jamison v. State of Texas*, 318 U.S. 413 (1943); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928); and *Zucht v. King*, 260 U.S. 174 (1922).

[1] It was determined at this time that the Hennepin County Municipal Court is in fact the Court in possession of the record at the present time. See Rule 12, United States Supreme Court Rules.

STATUTES INVOLVED

Minneaplis Code of Ordinances §§ 367.010 et seq., which provide as follows:[2]

> "367.010. License Required. No person shall operate or conduct a legitimate theater or moving picture theater without being licensed under this chapter.
>
> 367.020. Application for License. Any person desiring a license under this chapter may file with the Department of Licenses and Consumer Services an application in writing. The application shall be in such form and require such information as the department deems reasonably necessary and shall contain the following:
>
> (1) The name and home address of the applicant;
>
> (2) The relationship of the applicant to the business;
>
> (3) The name and location of the business; and
>
> (4) The full name, residence and address, date of birth and place of birth of each applicant, owner, manager, partner (if partnership), officer

[2] During the pendency of this litigation, the City of Minneapolis renumbered its Code or Ordinance. The references in this jurisdictional statement will be to the old numbering system, which was in effect at the time the prosecution was commenced.

and director (if corporation), and other persons who will have charge, maintenance or control of the business or the premises.

367.025. Insurance requirements. Each applicant for a license under this chapter shall file with the City Clerk a public liability insurance policy or certificate of insurance from a company authorized to do business in Minnesota, insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The policy of insurance shall be in limits of not less than one hundred thousand dollars for injury or loss to one person, three hundred thousand dollars for injury or less to one person, three hundred thousand dollars for each occurrence, and fifty thousand dollars property damage. The policy or certificate shall contain an endorsement as provided by §300.17 under this Code of Ordinances. No cancellation of of any insurance policy shall be valid except upon thirty days prior written notice to the City. Failure to keep in full force and effect, insurance required herein is grounds for revocation of the license.

367.030. City Divided into Zones. For the purpose of licenses under this chapter, the City is divided into zones entitled Zone 1, Zone 2, and Zone 3, which shall consist of the following territory:

Zone 1. All that part of the City except that portion lying between the Mississippi River and the West side of Grant Street and between Fourth Avenue North and Fourth Avenue South.

Zone 2. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the Mississippi River and the east side line of Fourth Street.

Zone 3. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the west side line of Fourth Street and the east side line of Grant Street.

367.040. License Fee. The annual fee for licenses under this chapter shall be as shown in the following table.

LICENSING OF VARIOUS ACTIVITIES

Size of Theater	*Zone 1*	*Zone 2*	*Zone 3*
Up to 400 seats	$72	$95	$235
401 to 600 seats	95	118	279
601 to 1,000 seats	118	140	373
1,001 to 1,500 seats	140	189	467
1,501 to 2,000 seats	140	235	557
Over 2,000 seats	140	235	930

(Amended March 25, 1966.)
(Amended October 25, 1968.)
(Amended February 11, 1972)

367.050. Expiration Date. All licenses shall expire on October 1 of each year.

367.055. Denial of Application. An application may be denied, after notice and hearing thereon, for any of the following reasons:

(1) The application contains false, fraudulent or deceptive statements.

(2) The applicant has not complied with any provision of this chapter.

(3) The proposed operation is not in compliance with any law relating to zoning, health, fire building or safety requirements.

(4) The applicant or owner, manager, partner, officer or director of the business, has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a theater.

367.060. Revocation of License. Any license issued under this chapter may be revoked in accordance with §16, chapter 4 of the City Charter.

Conviction of the licensee or the licensee's principal employees for a violation of Minnesota Statutes, §617.291 through 617.297, or a conviction for a violation of the Minneapolis Code of Ordinances, §870.080, shall constitute grounds for suspension or revocation of the theater license.

Advertising by the licensee on the exterior of a theater by means of any picture, photograph, drawing, or similar visual representation, or image of a person or portions of the human body which depicts nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, as defined in Minn. Stat. §617.292 on any theater shall constitute grounds for suspension or revocation of the theater license."

QUESTIONS PRESENTED

1. Whether the Minneapolis Theater Licensing Ordinance is facially unconstitutional as an illegal prior restraint on

freedom of expression, as guaranteed by the first and Fourteenth Amendments to the United States Constitution, in that said Ordinance permits a denial of a motion picture theater license on grounds other than whether or not the building housing and theater meets applicable health, fire, building, safety and zoning standards, and further permits the exercise of discretion by government authorities over the exercise of First Amendment rights.

2. Whether the Minneapolis Theather Licensing Ordinance is facially unconstitutional, as an illegal prior restraint on freedom of expression, as guaranteed by the First and Fourteenth Amendment to the United States Constitution, in that said ordinance permits revocation of a motion picture theater license on the basis of prior obscenity convictions.

3. Whether the license fees imposed under the Minneapolis Theater Licensing Ordinance impose an unlawful prior restraint on the exercise of First Amendment rights within the City of Minneapolis, in that the record fails to demonstrate the fees assessed to be rationally related to the costs actually incurred by the City in legitimate regulation of the licensed activities.

4. Whether the disclosure provisions of the Minneapolis Theater Licensing Ordinance have a chilling effect on constitutionally protected freedom of expression, and therefore violate the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant Jean L. Wernet was convicted in Hennepin County Municipal Court on October 1, 1976, of operating

a theater without a license, in violation of Minneapolis Code of Ordinances §367.010, now renumbered §267.1800. The text of the ordinance in question is set forth in full, *supra.*

The prosecution of Appellant commenced with a criminal complaint issued by the Hennepin County Municipal Court. A copy of said complaint is set forth in the Appendix at 19a. The complaint which was sworn out by one Wallace Cecil of the Minneapolis Police Department Vice Squad, states that Cecil and Vice Squad Officer Schoeben on June 7, 1976, were in the vicinity of the Adonis Theater at 904 Hennepin Avenue in the City of Minneapolis and "observed said theater to be open for business to the public." The complaint further stated that the officers "knew that the theater had not been issued a license to operate. The officers entered and observed a party identified as Jean Louis Wernet, Defendant herein, seated behind the ticket counter. After the Defendant was advised of her rights, she stated to the officers that her employers told her that they could operate without a license."

Upon issuance of a formal written complaint, Appellant moved to dismiss the charges against her, on the basis of the unconstitutionality of the Minneapolis Theater Licensing Ordinance, as amended, and on the further grounds that the complaint failed to allege sufficient facts to enable a neutral and detached magistrate to determine that probable cause existed to believe that she had committed a violation of the ordinance in question.

Said motion was denied by the Honorable C. William Sykora, Judge of Hennepin County Municipal Court, in an Order and Memorandum filed September 22, 1976, and set forth in the Appendix at 10a-15a.

On October 1, 1976, the Defendant was convicted in a court trial in Hennepin County Municipal Court for operating a theater without a license, in violation of §367.010. From that conviction, Appellant appealed to Hennepin County District Court.[3]

On July 31, 1978, the Hennepin County District Court, by a three-judge appeal panel, affirmed Appellant's conviction in all respects, sustaining the validity of the ordinance against the constitutional challenges raised by Appellant in Municipal Court, and on appeal to District Court.

Appellant then proceeded to file a timely petition for permission to appeal to the Minnesota Supreme Court from the District Court.[4]

On October 24, 1978, the Minnesota Supreme Court denied Appellant's petition for permission to appeal "in as much as the Hennepin County District Court, upon appeal, fully considered the constitutional issues raised by the party . . . ." See Appendix at 16a.

From that Order, denying permission to appeal and sustaining the constitutionality of the Minneapolis Theater Licensing Ordinance, Appellant appeals, pursuant to 28 U.S.C. §1257(2).

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[3] In Minnesota, appeals from misdemeanor convictions proceed from Municipal or County Court to District Court. See Rule 28.01, subd. 2 of the Minnesota Rules of Criminal Procedure.

[4] In misdemeanor cases in Minnesota, a criminal defendant must obtain permission to appeal to the Minnesota Supreme Court from any appellate decision in the District Court. See Rule 29.02, subd. 6 of the Minnesota Rules of Criminal Procedure.

THE QUESTIONS ARE SUBSTANTIAL

I. The Minneapolis Theater Licensing Ordinance is facially unconstitutional as an illegal prior restraint on freedom of expression, as guaranteed by the First and Fourteenth Amendments to the United States Constitution, in that it permits denial of a motion picture theater license on grounds other than whether or not the building housing the theater meets applicable health, fire, building, safety and zoning standards, and further permits the exercise of discretion by government authorities over the exercise of First Amendment rights.

At the outset, it should be noted, that when the City of Minneapolis attempts to license the operation of motion picture theaters for legitimate theaters, the City is licensing an activity which the First and Fourteenth Amendments allow Petitioner to conduct as a matter of right. It is well settled that the right to freedom of expression, as guaranteed under the free press and free speech clauses of the First Amendment, made applicable to the states by the Fourteenth Amendment, includes the right to express one's self by means of motion pictures. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). Because the right to show motion pictures is constitutionally guaranteed, the authority of the City to license the showing of motion pictures is extremely limited.

One of the earliest decisions by this Court prohibiting the licensing of the First Amendment activities was *Lovell v. City of Griffin,* 303 U.S. 444 (1938). In that case, this Court held unconstitutional a Griffin, Georgia city ordinance prohibiting the distribution of circulars, hand-

books, or literature of any kind without first obtaining written permission from the City Manager. In holding the ordinance unconstitutional this Court declared:

> "We think that the Ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of freedom of the press by subjecting it to license and censorship. The struggle for freedom of the press was primarily directed against that power that John Milton directed his assault by his 'appeal for the liberty of unlicensed printing.' The liberty of the press became initially the right to publish '*without* a license what formerly could be published *with* one (emphasis in original, citation omitted.)' While this freedom from previous restraint on publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. (Citation omitted)."

Five years later, in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), this Court again declared unconstitutional any attempt to subject rights guaranteed by the First Amendment to the United States Constitution to the licensing power of the state. The case involved the constitutionality of a Jeantte, Pennsylvania ordinance requiring all persons canvassing or soliciting orders for merchandise of any kind within the city to pay a license fee and obtain a license, as the ordinance was applied to Jehovah's witnesses, who were selling religious books door-to-door.

In declaring the ordinance unconstitutional, as applied to Jehovah's Witnesses, this Court held the state was with-

out power to exact a license tax for the privilege of exercising rights which the Constitution of the United States guarantee. This Court stated:

> "It is one thing to impose a tax on the income of property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. (Citations omitted.) Those who can tax the exercise of this religious practice can also make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive the religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." *Id.* at 112.

This Court further stated:

> "It is a license tax – a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (citation omitted) although it may tax the property used in, or the income derived from that

> commerce, so long as those taxes are not discriminatory. (Citations omitted). A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down (citations omitted)." *Id* at 113.

In invalidating the license tax on the exercise of a First Amendment right, this Court did indicate that licenses could be imposed pursuant to regulatory schemes and taxes collected incidental to those regulatory schemes. However, the Court specifically noted that such regulation and fee schemes differ markedly from a license tax imposed for the privilege of exercising First Amendment rights.

> "The constitutional difference between such a regulatory measure and a tax on the exercise of a Federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (citations omitted), it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.' (Citations omitted)." *Id.* at 114, footnote 8.

These principles of basic First Amendment laws have been clearly recognized by the Minnesota Supreme Court as far as the licensing of motion picture theaters is concerned. While recognizing that it is within the police power of the state to require a license as a condition precedent to the operation of a motion picture theater, *Franklin Theater Corp. v. City of Minneapolis*, 293 Minn. 591, 198 N.W. 2d 558 (1972), the Minnesota Supreme Court has also clearly recognized that the City's ability to require such a license is clearly limited by the First Amendment to the United States Constitution. In *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W. 2d 370 (1975); the court stated:

> "It has been suggested that the power of the City to grant or deny a license to operate a motion picture theater is coextensive with the power of the City to grant or deny a license to operate any other legitimate business. Proponents of this argument point to the fact that the City may deny a license to sell liquor or to operate a massage parlor to an applicant who has been convicted of a crime bearing a reasonable relationship to the business for which the license is sought. They argue by analogy that the City may also deny a license to operate a motion picture theater to any applicant who has been convicted of a crime relating to obscenity. However, when the City licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result, the power of the City is more limited than when the City licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor." 227 N.W. 2d at 372-373.

In a footnote to this quotation, the court further states:

> "There is no question that a municipality in determining whether or not to grant or deny a license to operate a motion picture theater may inquire to determine whether or not a theater meets authorized zoning, health, fire, building, and safety requirements." *Id.* at 373.

From these cases, a number of general principles are clearly apparent, as far as the City's ability to license a motion picture theater is concerned:

First of all, it is clear, that in the showing of motion pictures is a right constitutionally protected by the First Amendment, the City may neither license nor exact a fee for the privilege of showing motion pictures.

Secondly, the City does have a legislative interest in regulating motion picture theaters to assure that said theaters are housed in buildings which meet necessary health, fire, safety, and zoning standards.

Thirdly, any license fee charged by the City cannot be a fee for the privilege of showing motion pictures, since the showing of motion pictures is a right guaranteed by the First and Fourteenth Amendments to the United States Constitution. Any license fee must be reasonably related to the City's sole legitimate regulatory purpose, namely assuring that the buildings in whch motion pictures are shown meet legitimate zoning, health, fire, safety and building requirements.

Judged by these standards, the Minneapolis Theater Licensing Ordinance is clearly unconstitutional on its face. The ordinance licenses the very act of exercising a right

guaranteed by the First Amendment to the Constitution of the United States, and authorizes denial of licenses to exercise First Amendment rights for reasons going far beyond the necessary zoning, health, fire, safety and building requirements recognized by the Minnesota Supreme Court.

To begin with, the licensing ordinance clearly permits the City of Minneapolis to deny a motion picture theater license for reasons other than whether or not the building in which the theater is located meets applicable zoning, health, fire, building or safety regulations. Section 367. 055(2), taken in conjunction with §367.020(4), clearly permits the City Council to deny a motion picture theater license for failure of the applicant to disclose the residence address, full name, date and place of birth of each applicant, owner, manager, partner, officer, and director and all other persons who will have control over the management of the business conducted on the premises as a part of the theater license application. Section 367.055(1) further permits denial for any deceptive statement concerning ownership, management, or control of the premises. None of these regultions relate directly to zoning, fire, health, safety or building regulations, nor are they reasonably related thereto. Thus the Ordinance goes beyond the constitutionally limited purposes for licensing a motion picture theater, and said Ordinance is therefore unconstitutional.

An additional unconstitutional provision is that contained in §367.055(4), which authorizes denial of a motion picture theater license if any applicant, owner, manager, partner, officer or director of the business has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a threater. This provision, while superficially related to legitimate constitutional purposes, goes far beyond that which is necessary to enforce the state's legitimate regulatory purposes. In fact, the provision places the City on the horns of a dilemma. If the provision mandates the denial of a license to any person who has ever been convicted of any building, fire, or safety code regulation, the it would obviously prohibit for three years any persons from obtaining a motion picture theater license who had on one occasion negligently failed to update his fire extinguishers, or neglected to fix leaky pipes. Certainly no one could seriously argue that if the Minneapolis Star and Tribune Corporation were to be convicted of such violations, the state could legitimately deny the Star and Tribune Corporation the right to publish newspapers for a period of three years. Yet, this type of prior restraint on freedom of expression is precisely that which is authorized by §376.055(4).

On the other hand, if the provision is not construed as mandatory disqualification from receiving a license, it would be unconstitutional for another reason. If the section is construed as vesting discretion upon the City Council to deny a motion picture theater license to any person convicted of even the most minor building code violation, the provision is unconstitutional in that it leaves the decision to grant or deny the license to the discretion of a public official, something which the Court has previously prohibited. See *Lovell v. City of Griffin, supra,* 303 U.S. 444, 58 S.Ct. 666 (1938); *Staub v. City of Baxley,* 355 U.S. 313 (1958). Thus, if the Ordinance leaves the de-

cision to deny a license on the basis of building code violations to the discretion of the City Council, that very permission of discretion is unconstitutional as a prior restraint on freedom of expression under the above-cited decisions.

The Hennepin County District Court rejected this contention simply by stating that the grounds specified for denial "relate directly to the City's interest in its citizens' health and safety," and by further stating that the Ordinance does not "allow the unrestrained exercise of discretion found repugnant to the exercise of free speech." Memorandum of District Court, Appendix, p. 5a.

The argument of the District Court is anything but persuasive. To be sure the exercise of discretion is not "unrestrained," because a fire code or building code violation is necessary to trigger its exercise. However, it is undisputed that once a building or fire code violation occurs, the City Council has the absolute discretion to grant or deny a license for any reason whatsover, including reasons totally unrelated to health or safety, such as a dislike of the contents of the motion picture shown.

Moreover, the cases cited by Appellant prohibit far more than "the unrestrained exercise of discretion" in First Amendment cases. Perhaps the amount of discretion permitted in the First Amendment licensing area was best delineated by the United States District Court for the District of Kansas in *Swearson v. Meyers*, 455 F.Supp. 88 (D.Kan, 1978). In that case, the court granted a preliminary injunction enjoining the enforcement of a soliciting licensing ordinance in Kansas City, Kansas, as that ordinance was applied to members of the Unification Church who wished to solicit for religious purposes within the

City of Kansas City. Among the reasons for granting the preliminary injunction was a clear finding that the licensing ordinance in question permitted the exercise of discretion to grant or deny licenses in the First Amendment area. In discussing the amount of discretion constitutionally allowed to public officials in the First Amendment licensing area, the court stated:

> "Plaintiffs' argument that the Ordinance is constitutionally invalid because it lacks definite standards and vests discretion in City officials is supported by a long line of Supreme Court cases invalidating State or local licensing laws. (Citations omitted.) The common thread running through these opinions is that licensing laws governing conduct protected by the First Amendment are invalid unless they include precise, narrow, definite, and objective standards from which the appropriate official must make his decision to grant or deny the license application. The cases cited above seem to deal exclusively with licensing laws held invalid, and except in a negative fashion do little in teaching what 'standards' would be constitutionally adequate. It is clear, however, that the stancards must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made, or discretion to be exercised by the appropriate licensing official. In other words, *the decision to grant or deny the license application must be virtually a ministerial one* (emphasis in original.)" *Id.* at 91.

Thus, the test of the constitutionality of a First Amendment licensing ordinance is not whether or not there is "un-

restrained exercise of discretion," as found by the District Court, but rather whether the license application process has sufficiently definite and objective criteria so that the decisions to grant or deny an application is "virtually a ministerial act." Certainly, the decision as to whether or not a theater should be granted or denied a license, because of a past fire code violation of a single one of the theater's employees, without any guidelines as to the exercise of that discretion, it is certainly not a ministerial act. It is precisely the kind of grant or discretion which would allow denial of license based upon content of films shown, and would thus render the ordinance unconstitutional.

II. The Minneapolis Theater Licensing Ordinance is further unconstitutional, on the grounds that it permits revocation of a motion picture theater license on the basis of prior obscenity convictions.

An even more blatant prior restraint on First Amendment freedoms than that contained in the denial provisions of the licensing ordinance is that contained in the revocation provision. Section 367.060 permits the revocation of a motion picture theater license upon the conviction of the licensee or any of the licensee's principal employees for a violation of Minn. Stat. § 617.291 through 617.297, statutes which relate to the exhibition of explicit sexual material to minors, or conviction for a violation of Minneapolis Code of Ordinances § 870.080, the city ordinance prohibiting the sale or display of obscene materials.[5] Therefore, even if an application is granted a license, regardless of any prior convictions, if, during the course of his operation of the theater, he, or any of his principal employees, are convicted of any violation of the city obscenity ordinance or the state statutes concerning the exhibition of sexually explicit materials to minors, the license may be revoked or suspended.

[5] The complete texts of these statutory provisions is set forth in the Appendix at 21a-26a.

Such a provision is directly in conflict with the decision of the Minnesota Supreme Court in *Alexander v. City of St. Paul, supra,* 303 Minn. 201, 227 N.W.2d 370 (1975). In that case the Minnesota Supreme Court unanimously held that St. Paul City Ordinance § 372.04(g) which permits revocation of a motion picture theater license upon any conviction of the theater or its employee of any state, federal or local law involving obscenity, to be unconstitutional as a prior restraint on freedom of expression. In declaring the ordinance to be unconstitutional and reversing the City Council's revocation of a theater license, the Minnesota Supreme Court stated:

> "The remedy presently available to the City of St. Paul for Plaintiff's past abuses lies not in the suppression of the right to show all films, but in criminal prosecutions for violation of constitutional obscenity laws. The risk that criminal sanctions will be insufficient to deter future violations of the Ordinance cannot justify the City's attempt to revoke Plaintiff's license in the face of his right to the free speech guaranty of the First Amendment." 227 N.W. 2d at 373.

The holding of the Minnesota Supreme Court is consistent with the overwhelming weight of judicial authority in other jurisdictions on this issue. See *Perrine v. Municipal Court,* 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied,* 404 U.S. 1038; *City of Seattle v. Bittner,* 81 Wash. 2d 747, 505 P.2d 126 (1973); *Avon 42nd Street Corp. v. Myerson,* 352 F.Supp. 994 (1972); and

People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 642, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), *cert. denied, sub nom. Van de Kamp v. Projection Room Theater,* 429 U.S. 922 (1976).

The Hennepin County District Court rejected these arguments, not on their merits, but rather by holding that because Appellant was not directly affected by the revocation provisions, she lacked standing to challenge the constitutionality of those provisions. The Distrct Court held that revocation provisions could be challenged only "when interdependent with remaining statutory sections or where the revocation section contributes to the infirmity of other sections."

This argument is unpersuasive for two reasons, and should be reversed by this Court on appeal.

First of all, even under the standard enunciated by the District Court, Appellant's standing to challenge the revocation provisions is clear. The District Court concedes that if the revocation provision is interdependent with remaining statutory sections or if the revocation provision contributes to the infirmity of other sections, then Appellant would have standing to challenge the revocation provision. The record in this case clearly establishes that to be the case here. In the Municipal Court, Judge Sykora specifically upheld the constitutionality of the disclosure requirements contained in the theater licensing ordinance, requiring that the identities of all owners, managers, and directors to be disclosed, solely on the basis of the City's need to enforce the revocation provisions. See Memorandum of Judge Sykora, Appendix p. 15a. Neither the District Court nor the City below challenged Appellant's standing to challenge the disclosure provisions was to enable the City to enforce its revocation provisions, then it is clear that the revocation provisions are interdependent with the disclosure provisions

and contribute to the unconstitutionality of the disclosure provisions. As such, Appellant clearly has standing to attack the revocation provisions.

Secondly, persuasive policy reasons exist for holding that the Appellant and others similarly situated have standing to challenge such unconstitutional revocation provisions.

To begin with, there seems to be little rational basis for distinguishing between a defendant having the standing to raise an unconstitutional condition for obtaining a license in this proceeding, while not permitting him to raise the issue of an unconstitutional condition for the maintenance or retention of a license. Secondly, the very record before the Court in *Alexander v. City of St. Paul, supra,* dictates the desirability for raising the constitutionality of a revocation provision prior to actual revocation. In *Alexander,* the license in question was revoked on July 19, 1974, and, except for a brief 15-day period in which the court issued a temporary restraining order, the theater was, in fact closed, unconstitutionally, between July 19, 1974, and February 28, 1975, the date on which the Minnesota Supreme Court finally rendered its decision holding the initial revocation to be unconstitutional. As a result of not raising the issue of the unconstitutionality of the revocation until a revocation actually occurred, the plaintiff in *Alexander* was forced to close a theater for nearly six months, when the reason for closing was actually unconstitutional.

Such a loss of First Amendment rights should not be necessary in order to challenge a revocation provision as clearly unconstitutional as the one in the Minneapolis Ordinance.

III. The Minneapolis Theater Licensing Ordinance is further unconstitutional because the fee system imposes an unlawful prior restraint on the exercise of First Amendment rights within the City of Minneapolis, and further denies to certain theaters equal protection of the laws, under the Fourteenth Amendment.

As noted by this Court as early as the *Murdock* case, no license fee may be charged for the privilege of exercising a right which the constitution guarantees. Any fee must be related to a legitimate regulatory scheme, which incidentally may touch upon protected First Amendment rights, and the fee may be no greater than that which is reasonably necessary to reimburse the government for its actual costs in implementing any necessary regulatory scheme. As applied to the licensing of motion picture theaters in Minneapolis, the constitutionally required standard must be that the City may not charge any license fee for the privilege of operating a motion picture theater per se, but rather may charge only that fee which is necessary to reimburse the City for its actual expenses incurred in assuring compliance with a legitimate regulatory scheme to-wit: assuring that the buildings in which theaters are housed meet necessary zoning, health, fire, safety, and building regulations. By contrast, the fee schedule set forth in the Minneapolis Theater Licensing Ordinance is a license tax on the exercise of First Amendment rights, and is totally unrelated to any actual expenses incurred in assuring compliance with a legitimate regulatory scheme of the City. This is revealed by a simple look at the fee schedule set forth in the licensing ordinance. According to that schedule, a 2,000-seat theater located in Zone 3 of the City must pay a license fee nearly thirteen times greater than that required for a 400-seat theater located in Zone 1. Certainly, the

City cannot reasonably contend that it is thirteen times more expensive to inspect a 2,000-seat theater in Zone 3 for fire, health, safety, building, and zoning requirements, as it is to inspect a 400-seat theater in Zone 1 and the identical building, with the same number of seats located in Zone 3. The Zone 3 theater is more than four times as expensive to license. Clearly, it cannot reasonably be asserted that it is four times as expensive for a building or fire inspector to enforce health, fire, safety, building, or zoning requirements for the same building in one section of the city than it is for another section of the city. The license scheme is therefore totally unrelated to reimbursing the City for its reasonable expenses in performing a legitimate regulatory scheme, and rather constitutes an unconstitutional license tax on the privilege of conducting an activity which the First Amendment to the United States Constitution guarantees.

The Hennepin County District Court rejected this argument by stating the following:

> "An analysis of the present license scheme reveals that the variable fees charged are reasonably related to the variation in cost incident to licensing different size theaters in different areas of the city. Distinctions made regarding cost differences are not arbitrary and are therefore valid. Similarly, the amount of fees charged reasonably estimates costs and any revenue is identical to estimation of expenses in ordinance enforcement.' Dist. Ct. Memorandum, Appendix p. 7a.

The following finding of the District Court was utterly without support in the record of this case. In fact, the Municipal Court, by Judge Sykora, made precisely the opposite finding as to the showing the City had made to jus-

tify the ordinance. Judge Sykora wrote, "No explanation was offered by the state as to why the enforcement of the regulations by inspection or otherwise would vary dependent upon the location or size of the theater . . . ." Mun. Ct. Memorandum, Appendix p. 14a.

In reaching the decision it did, the Hennepin County District Court, and, the Minnesota Supreme Court, in its refusal to consider the case on appeal, rejected the virtually unanimous weight of judicial authority on determining the reasonableness of license fees in the First Amendment area. To be sure, the general proposition of law is that courts will presume the reasonableness of a license fee, unless the party challenging the fee comes forward with evidence or facts indicating the fee to be manifestly unreasonable and beyond the discretion of the licenseing authority. See, for example, *Minneapolis-St. Paul Ry. Co. v. City of Minneapolis*, 326 Minn. 109, 52 N.W. 2d 120 (1952). However, when the licensing ordinance regulates activity entitled to the protection of the First Amendment, the courts which have ruled on the question have clearly stated that a different presumption and different burden of proof applies.

In this regard, the leading case is *Busey v. District of Columbia*, 78 U.S. App. D.C. 189, 138 F.2d 592 (1943), a case involving the constitutionality of a Federal statute licensing vendors in Washington, D.C. In that case, the United States Court of Appeals originaly upheld the constitutionality of the licensing statute. The United States Supreme Court vacated that judgment, in light of its decision in *Murdock v. Pennsylvania, supra.* See *Busey v. District of Columbia*, 319 U.S. 579 (1943). On remand, the United States Court of Appeals for the District of Columbia Circuit reversed its prior decision and invalidated the vendor's licensing statute. It based its decision, in part, on a holding that

no showing of the reasonableness of the license fee charged had been made. In doing so, the court clearly held that in First Amendment cases, the government has the burden of proof of demonstrating the reasonableness of the license fee. The court stated:

> "We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. In many contexts it is both rational and convenient to presume 'the existence of facts supporting the legislative judgment.' But it would be neither rational or convenient to presume that the uniform fee by which Congress has sought to cover the cost of policing all sorts of street sales happens not to exceed the cost of policing the particular sort involved here.
>
> The case comes to this. The argument in *Opelika*[6] and *Murdock* implies that a regulatory license fee which exceeds the cost of policing

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6 The Court is referring to *Jones v. City of Opelika*, 319 U.S. 103 (1943), a companion case decided with *Murdock v. Pennsylvania, supra.* The decision vacated an earlier decision of this Court upholding the constitutionality of a municipal solicitation licensing ordinance. See *Jones v. City of Opelika*, 316 U.S. 584.

> sales of religious propaganda is a prohibited interference with the freedoms of speech, press, and religion. There is no evidence, and no clear probability that the District of Columbia license fee does not exceed the cost of policing these sales. No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." 318 F.2d at 595-596.

Other courts which have dealt with the reasonableness of license fees in the First Amendment area have followed the approach of the District of Columbia circuit in the *Busey* case. For example, in *Chester Branch of the N.A.A.C.P. v. City of Chester,* 253 F. Supp. 707 (E.D. Pa. 1966), the court invalidated a Chester, Pennsylvania ordinance requiring a permit for the use of a sound truck, and a $25 fee for obtaining the permit, when the government, in dealing with a case in volving First Amendment rights, produced no evidence to demonstrate that the actual cost of issuing the permit and enforcing the permit licensing ordinance itself was related to the level of the license fee. Similarly, in *New York Times Inc. v. Arizona Board of Regents,* 20 Ariz. App. 422, 513 P.2d 960 (1973) the court invalidated a University of Arizona regulation licensing the distribution of newspapers on campus, and imposing a $2.00 per newsstand license fee, in the absence of any proof that the license fee imposed bore any reasonable relationship to the expenditures actually incurred by the University.

Thus, courts in other jurisdictions which have considered the subject have clearly indicated that when the governmental authority fails to come forward with any evidence to support the reasonableness of its license fee, when that license fee covers First Amendment activity, the court is obligated to strike

down the fee as an unconstitutional tax on the exercise of First Amendment privileges.

Moreover, other courts have clearly held that when government adopts a classification scheme under which certain persons or groups of persons are granted more fundamental rights, such as First Amendment rights, than are other groups or persons, such a classification scheme may be justified only if the state establishes a compelling state interest to support the classification. See *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Skinner v. Oklahoma,* 316 U.S. 545 (1942); *O'Neill v. Dent,* 364 F. Supp. 565 (E.D.N.Y. 1973); and *Salem Inn, Inc. v. Frank,* 381 F. Supp. 859 (E.D.N.Y. 1974), affirmed, 522 F.2d 1045 (2d Cir. 1975).

Thus, when the City failed to set forth any evidence at all to justify the reasonableness of the license fee or the disparity in fees, it failed to meet its burden of proof to justify a license fee in a First Amendment area. It further failed to set forth any evidence establishing anything remotely approaching a compelling state interest to support a classification under which some persons are granted the right to exercise First Amendment rights at a substantially lower price than others. In fact, far from making any showing of a compelling state interest, the city, as the Municipal Court noted, offered no explanation whatsoever as to the wide variation of the license fees. Clearly, in the absence of any explanation or any evidence in the record, the only conclusion that can reasonably be reached is that the city's burden of establishing the reasonableness of the fee and the compelling state interest to justify the disparity in fees, has not been met in this case. As a result, the fee system must be declared unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution.

IV. The Minneapolis Theater Licensing Ordinance is further unconstitutional, in that it has a chilling effect on constitutionally protected freedom of expression, and therefore violates the First and Fourteenth Amendments to the United States Constitution.

Apart from the fact that the Minneapolis Theater Licensing Ordinance permits the denial of a motion picture theater license on grounds other than whether or not the building in which the theater is housed meets applicable zoning, health, fire, safety, and building regulations, the Ordinance is further unconstitutional in that an additional stated ground for denial of a motion picture theater license is one which has been specifically prohibited by the courts as a precondition to the exercise of First Amendment rights. That additional condition is the requirement that an applicant for a theater license as a pre-condition to being allowed to operate a motion picture theater, disclose to the City of Minneapolis the identities of all owners, partners, operators, or employees having anything to do with the management or operation of said motion picture theater. For years, this Court, and various lower courts, have held that such requirements, which demand public identification as a prerequisite to the exercise of First Amendment rights, are unconstitutional as having a chilling effect on the exercise of such rights.

In *Talley v. California*, 362 U.S. 60 (1960), the United States Supreme Court invalidated a Los Angeles city ordinance prohbiting the distribution of handbills or circulars, unless the names and addresses of the persons causing the handbills to be circulated were printed thereon. In declaring the requirement of identification of authors and distributors to be unconstitutional, this Court clearly indicated that the freedom of speech and freedom of the press pro-

visions set forth in the First Amendment to the United States Constitution include the right of the individual to speak and print anonymously. This Court declared:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as much essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ovell v. Griffin*, 303 U.S. at 452.
>
> Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing laws of England, which was also enforced on the colonies was due in part to the knowledge that exposure of the names of the printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers . . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.
>
> We have recently had occasion to hold in two cases that there are times and circumstances when

states may not compel members of groups engaged in dissemination of ideas to be publicly identified. *Bates v. Little Rock,* 361 U.S. 516; *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of matters of public importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia ordinance is void on its face." 362 U.S. at 64-65.

Relying on the decision of the United States Supreme Court in *Talley,* the New York courts invalidated a similar ordinance in *People v. Mishkin,* 17 A.D. 2d 243, 234 N.Y.S. 2d 342 (1st Dept. 1962), affirmed without opinion, 15 N.Y. 2d 671, 255 N.Y.S. 2d 881, 204 N.E. 2d 209 (1964). That case involved the enforcement of the state's general business law which provided that every publication other than newspapers and magazines should "conspicuously have imprinted . . . the true name and address of the publisher or printer." The court held that under the rationale imposed by the United States Supreme Court in the *Talley* decision, the requirement of identification of printers and publishers was unconstitutional as having a chilling effect on freedom of expression.

The same rationale for invalidating laws requiring identification of proponents of material protected by the First Amendment was voiced by this Court in *Lamont v. Postmaster General,* 381 U.S. 30, (1965), in which this Court invalidated §305(a) of the Postal Service and Federal Employees Salary Act of 1962, which allowed for the detention by the Secretary of the Treasury of materials deemed to be "communist political propaganda," to be delivered

only if the named addressee specifically requested said materials. The narrow ground for invalidating the statutory provision is the belief by the Court that to require the addressee of material protected by the First Amendment to identify himself to the government before he would be allowed to receive such material would violate the addressee's rights under the First and Fourteenth Amendments to the United States Constitution. In *Lamont,* therefore, the Court recognized not only a right to speak and publish anonymously but a right to receive materials protected by the First Amendment anonymously.

Similarly in *Zwickler v. Koota,* 290 F.Supp. 244 (E.D. N.Y. 1968), rev. sub. nom. *Golden v. Zwickler,* 394 U.S. 103, a three-judge United States District Court panel invalidated a New York statute making it a crime to distribute for another any handbill containing any statement concerning any candidate in connection with any election, unless the name and post office address of the printer and the person on whose instance the handbill was distributed was contained thereon. The court relied on the *Talley* and *Mishkin, supra,* in reaching its decision. The reversal of the three-judge court by this Court was based, not on a disagreement on the merits of the case, but rather upon the belief that the merits should not be heard by the District Court because the case had become moot.

In *Strassver v. Doorley,* 432 F.2d 567 (1st Cir. 1970), the Court invalidated a Providence, Rhode Island ordinance requiring that a "bootblack or newsboy" register with the Bureau of Licenses and obtain a permit to operate, and further requiring anyone holding such a permit to wear a hat or cap containing a numbered metal badge provided by the city upon payment of a $.50 deposit. The Plaintiffs in the case were individuals attempting to sell "an al-

legedly offbeat newspaper entitled *Extra.*" In holding the ordinance unconstitutional the Court declared:

> "Hence, the only question is whether the physical acts of registering and procuring and wearing a badge can constitutionally be required of a newspaper vendor under what remains of the ordinance. If we were to find this permissible, Plaintiffs would be required to open themselves to possible identification as the ones associated with *Extra,* to deposit $.50 with the City, and possibly to suffer the felt stigma of having to display a button. In face of these burdens upon the exercise of First Amendment rights, Defendants point to no governmental interest of any importance that would be served by registration and identification. We therefore hold these requirements of the ordinance, like its other provisions, unconstitutional."

Two years later, the same court held an almost identical ordinance from another city to be unconstitutional, relying on *Talley v. California, supra.* See *Wulp v. Corcoran,* 454 F.2d 826 (1st Cir. 1972).

A similar situation was addressed by the Seventh Circuit in *Jacobs v. Board of Commissioners,* 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975). In that case, the court invalidated a school regulation prohibiting students from distributing any literature within the school "unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself." In holding the regulation to be invalid, the Court declared:

> "Anonymous student publications performed similarly within the student community; without

> anonymity, without fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. Although the rule leaves students free to distribute anonymous literature beyond the schoolhouse gate, the question here as in *Tinker,* is whether the state has demonstrated a sufficient justification for this prohibition within the school community, where students and teachers spend a significant portion of their time. (Citations omitted). Defendants contend that the names of persons who have 'participated in publication' of literature must be provided so that those responsible for publications of libelous or obscene articles can be held accountable. However, here as in *Talley,* the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally, 1.3.1.6 applies only to literature the contents of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school authorities or discipline." 490 F.2d at 607.

It should also be noted that this decision was vacated by this Court, not as a result of any disagreement as to the merits of the decision, but rather because the plaintiff students in question had graduated from school, making their claims moot.

Even more recently, a three-judge Federal court in printing industries of *Gulf Coast v. Hill,* 382, F.Supp. 801 (S.D. Tex. 1974), stay granted, 419 U.S. 805, prob. jur. noted, 419 U.S. 1088, vacated, 422 U.S. 937 (1975), invalidated

and enjoined enforcement of a Texas statute requiring all printed or published political advertising to have printed on it the name and address of the printer and the person paying for the advertising. Again, the judgment was vacated by this Court. However, the vacation of the judgment was not based on the merits of the case, but rather because of the fact that during the pendency of the litigation, the Texas legislature had amended the statute in question, and the Court remanded the case for further consideration in light of the amended statute.

The only instance in which this Court has upheld disclosure requirements, as applied to the exercise of First Amendment rights was in *Buckley v. Valeo,* 424 U.S. (1976). In that case, this Court considered various challenges to certain provisions of the Federal Election Campaign Act of 1971, as amended in 1975, including statutory requirements that the candidates for election to Federal office disclose the identities of contributors to their campaigns. Even though this Court upheld the constitutionality of the disclosure requirements this Court noted:

> "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since (NAACP) v. Alabama we have required that the subordinating interests of the state must survive exacting scrutiny. (Citations omitted). We have also insisted that there be a 'relevant correlation' (citation omitted) or 'substantial relation' (citation omitted) between the governmental interest and the information required to be disclosed (citation omitted). This type of scrutiny is necessary even if any deterrent effects on

> the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." 424 U.S. at 64-65.

However, this Court noted that weighed against the legitimate claims of the plaintiffs were compelling governmental interests in support of disclosure. This Court stated:

> "The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is being spent by the candidate' in order to aid the voters in evaluating those who seek Federal office. . . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . .
>
> Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering that data necessary to detect violation of the contribution limits described above." 424 U.S. at 66-67.

Finally, this Court noted that the disclosure requirements in the Federal Election Law were clearly distinguishable

from the ordinance invalidated in *Talley v. California, supra:*

> "The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. The city urged the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was 'in no manner so limited.' 362 U.S. at 64, 80 S.Ct. 536, 4 L.Ed. 2d 559. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where information sought has a substantial connection with governmental interests sought to be advanced." 424 U.S. at 81.

By contrast, in the instant case, there is no showing that the disclosure of the manager, directors, partners, and all employees involved in the operation of a motion picture theater is in any way related to any of the legitimate governmental interest involved in licensing a motion picture theater nor is the ordinance itself so limited.

Certainly, the Municipal Court Order and Memorandum upholding the constitutionality of this particular provision of the Ordinance is unpersuasive. In upholding the constitutionality of the disclosure requirements Judge Sykora wrote:

> "It may be that disclosure of the names and addresses required by §(367.020) has a chilling effect upon such person (sic) exercising their right of freedom of speech. It would also have a deterring effect upon a desire to violate the criminal laws referred to in §(367.060) of the Ordinance. The latter overrides and take priority over the former." Memorandum of Judge Sykora, Appendix p. 14a-15a.

Therefore, the only justification set forth by Judge Sykora for requiring the disclosure of names, addresses, date of birth, and place of birth of all owners, operators, managers, partners or employees having managerial duties is that such disclosure will enable the City to invoke the provisions of §367.060, involving revocation of licenses for commission of crimes related to obscenity and exhibition of sexually explicit materials to minors. However, as has already been pointed out, *supra,* that section is clearly unconstitutional in light of the decision of the court in *Alexander v. City of St. Paul, supra,* 303 Minn. 201, 227 N.W. 2d 370 (1975). Given the fact that the revocation section is itself unconstitutional, the fact that disclosure would assist in enforcing the revocation section certainly in no way operates to salvage the constitutionality of the disclosure requirements. In fact, if the purpose of the disclosure requirements is to enforce the unconstitutional revocation section, that fact should in and of itself invalidate the constitutionality of the disclosure requirements.

In fact, given the fact that the City's only legitimate interest in licensing a motion picture theater is to assure that all applicable zoning, health, fire, building and safety codes are observed, there can be no legitimate interest in the broad disclosure requirements contained in the licensing ordinance. The zoning, fire, health, safety, and building requirements all go to the physical structure of the building itself, not the operation of the motion picture theater. Therefore, all such requirements can clearly be enforced against the fee owner of the real property in question, which is a matter of public record. Moreover, such provisions can also be enforced against any person who makes

a license application on behalf of the theater. The disclosure of every person having anything to do with the theater in any capacity is in no way required to enforce these provisions. The mere requirement of a named person to contact concerning structural deficiencies of the building would more than suffice for the enforcement of any of the City's legitimate purposes in licensing. Therefore, it is unconstitutionally overbroad to demand as a precondition to the exercise of a First Amendment right that the identities of all persons involved in the operation of a motion picture theater be disclosed to the City.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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Attorney for Appellant

January 19, 1979

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

State of Minnesota,
Plaintiff,

vs.

File No. 66894

Jean L. Wernet,
Defendant.

O R D E R

The above-entitled matter came on for hearing before the undersigned judges sitting as an appeal panel of the District Court, on May 12, 1978 at the Hennepin County Government Center.

Randall D. B. Tigue, Esq., appeared on behalf of defendant-appellant Jean L. Wernet, and Mary M. Wahlstrand, Esq., Assistant Minneapolis City Attorney, appeared on behalf of plaintiff-respondent State of Minnesota.

The Court, having heard the arguments of counsel and having considered all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the Judgment of the lower court be, and the same hereby is, affirmed.

BY THE COURT:

/s/ Harold Kalina
Harold Kalina

/s/ A. Paul Lommen
A. Paul Lommen

/s/ James H. Johnston
James H. Johnston

Dated this 31st day
of July, 1978

Attached Memorandum to be made part of above Order.

MEMORANDUM

The defendant, Jean L. Wernet, appeals from a Municipal Court conviction for operating a motion picture theater without a license in violation of Minneapolis Ordinance § 267.1800 (previously numbered 367.010). The defendant was arrested on June 7, 1976 while she was seated at the ticket counter of the Adonis Theater. The trial court specifically held that the Adonis Theater was operating without a license and that the defendant was an employee of the theater.

In pre-trial motions the defendant challenged both the factual sufficiency of the criminal complaint and the constitutionality of the Minneapolis Theater Licensing Ordinance. Both motions were decided against the defendant with the court specifically finding Minneapolis Ordinance § 267.1800 - .1870 constitutional.

On appeal the defendant raises three major issues. First, the constitutionality of the ordinance is again attacked by claiming that it is an impermissible prior restraint on the defendant's freedom of expression. Secondly, because the defendant was merely an employee, and thereby had no obligation to obtain a theater license, the defendant alleges that there is insufficient evidence to sustain the conviction. Finally, defendant challenges the trial court's evidentiary ruling that the defendant could not inquire into previous license applications of the Adonis Theater.

THEATER LICENSING ORDINANCE

The appellant attacks the constitutionality of the theater licensing statute on the grounds that the provisions for license denial grant impermissibly broad discretion to the licensing authority; that the disclosure provisions of the statute are too broad; and the grounds stated for license revocation are an abridgment of appellant's First Amendment right of free speech.

This Court, for the reasons which follow, finds that the licensing authority's discretion is adequately circumscribed to prevent abuses and that the ordinance's disclosure requirements are substantially related to a legitimate government interest.

Additionally, this Court finds that the appellant lacks the requisite standing to challenge the ordinance's revocation provisions, and, therefore, the validity of this ordinance section is not addressed.

Expression by motion picture has consistently been held to be a protected form of speech for which the state could, under its police powers, require a license. *See, Young v. American Mini Theaters,* 427 U.S. 50 (1976). The most recent Minnesota consideration of the inherent conflict between the freedom of speech and licensing restrictions is found in *Alexander v. City of St. Paul,* 303 Minn. 201, 227 N.W.2nd 370 (1975), where the Court stated:

> It has long been recognized that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. However, it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. Thus, it is within the police power of the state to require a license as a condition precedent to the operation of a motion picture theater, under statutes and ordinances which set forth definitive, objective guidelines for the issuance of licenses so that the decision to grant or deny a license is not left to the discretion of a public official (citations omitted).
> *Id.* at _____, 227 N.W.2d at 372.

Our courts have recognized, therefore, that there are governmental interests, such as the health and safety of the public, which allow certain restrictions on free expression. These restrictions usually take the form of licensing ordinances which, under the *Alexander* test, must be definite and objective so as to preclude discretionary abuse in their operation. *Accord, Shuttleworth v. Birmingham,* 394 U.S. 147 (1969). We must, therefore, consider whether the Minneapolis Ordinance has sufficient guidelines to preclude the abuse of discretion.

The Minneapolis Ordinance sufficiently circumscribes the discretionary powers of the City Council by delineating four specific grounds for which a theater license may be denied. *See,* Minneapolis Ordinance § 267.1855. The routine approval of licenses do not require the affirmative action of the City Council but rather are automatic, with license denial requiring notice and a hearing. Additionally, the grounds specified

for denial relate directly to the City's interest in its citizens' health and safety. The Minneapolis Ordinance does not, therefore, allow the unrestrained exercise of discretion found repugnant to the exercise of free speech. *See, e.g., Southeastern Promotions, LTD. v. Conrad,* 420 U.S. 546, 554 (1975); *Lovell v. Griffin,* 303 U.S. 444 (1938).

The Minneapolis Ordinance is also attacked as being overbroad in requiring "the full name, residence address, date of birth of each applicant, owner, manager, partner, officer and director, and other persons who will have charge, management or control of the business or the premises." Minneapolis Ordinance § 267.1820 (4). This disclosure requirement, the appellant asserts, without specific proof, will result in a "chilling effect" on theater owners' exercise of First Amendment rights. Disclosure requirements must, after exacting judicial scrutiny, establish a relevant correlation or substantial relation between the disclosed information and the governmental interest. *See, e.g., Buckley v. Valeo,* 46 L. Ed. 2d 659, 713 (1976).

In the instant case the names of the corporate officers or persons managing the premises are required in order to insure the government can enforce its health and safety interests.

This Court finds that there is a substantial relation between the protection of the public using theater facilities and the disclosure of those responsible for proper operation of these establishments.

Where the rights of an individual are not directly affected or prejudiced by a licensing statute, or by a particular feature of the statute, he may not challenge the statute's constitutionality. *See generally,* 16 C.J.S. Constitutional Law § 76, p. 241 (1956).

In the present case the appellant is not adversely affected in any manner by the revocation provisions. The courts have, however, allowed constitutional assaults on licensing statutes by those who have not applied for a license and whose conduct, under a properly drawn statute, would clearly be prohibited. *See, e.g., Freeman v. Maryland,* 380 U.S. 51 (1965). An analysis of *Freeman* and its progeny reveal that such statute challenges were made against the license qualification or denial provisions and not independently against revocation provisions. *See, e.g., Shuttleworth v. Birmingham,* 394 U.S. 147 (1969). Revocation provisions were challenged only when interdependent with remaining statutory sections or where the revocation section contributes to the infirmity of other sections. Neither of these requisites are present in the instant case. Therefore, the appellants' challenge of the Minneapolis Ordinance must be restricted to denial provisions.

A similar situation existed in *Starr v. Preller,* 352 F. Supp. 530 (1972), *vacated on other grounds,* 413 U.S. 905 (1973), where a three judge panel restricted the plaintiff's statutory challenge to only those licensing provisions directly affecting the non-licensed ordinance violator. This restriction excluded revocation sections from consideration as the plaintiff lacked standing.

Similarly, Mrs. Wernet should be able to attack the Minneapolis Ordinance but only as to those portions of the statute which directly affect her. The revocation provisions do not.

The appellant further asserts that the theater licensing fee schedule, established by Minneapolis, is impermissible in its classification and amount. To be valid a licensing scheme must be reasonably related to the costs incident to the in-

suance of licenses and enforcement of the ordinance. *See, e.g., Lyons v. City of Minneapolis,* 241 Minn. 439, 63 N.W.2d 585 (1954). An analysis of the present license scheme reveals that the variable fees charged are reasonably related to the variations in costs incident to licensing different size theaters in different areas of the city. Distinctions made regarding cost differences are not arbitrary and are therefore valid. Similarly, the amount of fees charged reasonably estimates costs and any revenue is incidental to estimation of expenses in ordinance enforcement.

DEFENDANT'S EMPLOYMENT STATUS

The appellant next asserts that because of her status as an employee ticket-taker of the theater she is not subject to prosecution under Minneapolis Ordinance § 267.1810 for operating a motion picture theater without a license. Appellant would have this Court narrowly construe the ordinance as a specific requirement imposed only on theater owners, *c.f., People v. Siemon,* 265 App. Div. 885, 38 N.Y.S. 2d 280 (1942) (requirement that ticket prices be posted in window).

The ordinance in this case, however, cannot be so narrowly construed. The Minneapolis Ordinance places a duty upon the individual operating the theater regardless of ownership. If this duty is breached, the individual responsible should be liable for violation of the statute.

The facts adduced at trial clearly indicate that the defendant was operating the theater, as she had direct control over access to the theater. Aside from the projectionist, Mrs. Wernet was the only employee on the premises. Additionally, the appellant admitted she was operating the theater at the request of her employer. This Court, there-

fore, finds that Mrs. Wernet was operating the theater within the meaning of Minneapolis Ordinance § 267.1810.

It is also established law that an agent or employee may be convicted of operating a business without a license when he engages in a business for which his principle had failed to take out a license. *See, e.g., Edgil v. City of Carbon Hill,* 214 Ala. 532, 108 So. 355 (1926) (agent prosecuted for violation or ordinance requiring seller to obtain license). An analysis of the cases reveals clearly that where a business was controlled by a license requirement, either the principle or agent were liable for ordinance violation. *See, e.g., Waller v. City of Birmingham,* 37 Ala. 325, 67 So. 2d 421 (Ct. App. 1953); *State v. Rubenstien,* 171 Kan. 1, 228 P. 918 (1924).

In the present case Minneapolis is controlling the operation of movie theaters to ensure and protect the safety of the public. This case would therefore fall squarely within the line of cases which place responsibility upon agents and employees.

EVIDENTIARY ERROR

The final issue raised by appellant is that the trial court erred in excluding as irrelevant the cross-examination of a licensing supervisor into a previous license application of the appellant. An evidentiary ruling is within the discretion of the trial court and must not be reversed unless a clear showing of abuse of discretion is shown. *See, e.g., Renne v. Gustafson,* 292 Minn. 218, 194 N.W.2d 267 (1972). In the present case no such abuse is present. Even if the testimony as to previous license applications were admitted, it would not have provided appellant a viable defense, since

license application is not a defense to violation of a license statute. *See, e.g., Waller v. Birmingham,* 37 Ala. 325, 67 So. 2d 421 (Ct. App. 1953).

Based on this Court's finding that the Minneapolis Ordinance is constitutional and, further, that no procedural errors were committed by the trial court, this appeals panel must, and does, affirm the Municipal Court conviction of Mrs. Wernet.

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

MUNICIPAL COURT
FIRST DIVISION –
MINNEAPOLIS

State of Minnesota,
Plaintiff,
-vs-
Ferris Alexander,
Defendant,
and
State of Minnesota,
Plaintiff,
-vs-
Jean Louise Wernet,
Defendant.

MUNC. CT. #405027

ORDER

MUNC. CT #403691

The above-entitled matter, being on the Special Term calendar of the above-named Court, came on for hearing before the undersigned, on the 16th day of September, 1976, on motions to dismiss on the grounds of unconstitutionality of the City Ordinance requiring the licensing of theaters, and on motions of defendants' attorneys to dismiss on the grounds the Complaints failed to show probable cause. The Court referred these latter motions to the judges who approved said Complaints, namely, Judge Bowen in the Alexander matter and Judge Chapman in the Wernet matter.

Larry Warren, Esq., Assistant City Attorney, appeared for and on behalf of the State of Minnesota, in opposition to said motions;

Benjamin S. Houge, Esq., Attorney at Law, appeared for and on behalf of defendant Ferris Alexander, and in favor of said motions;

Randall Tigue, Esq., Attorney at Law, appeared for and on behalf of defendant Jean Louise Wernet, and in favor of said motions.

The Court, having considered the arguments of counsel and the memoranda submitted by the respective parties and being fully advised in the premises,
IT IS ORDERED that said motions with respect to the issue of constitutionality be and is in all respects denied.

BY THE COURT:

/s/ C. William Sykora
C. William Sykora
Judge of Municipal Court

Dated: At Minneapolis, Minn. this 22nd day of September, 1976.

Let the attached Memorandum be made a part of the Order herein.

State v. Wernet and State v. Alexander, Munc. Ct. Files #403691 and 405027.

MEMORANDUM

The first issue presented is whether the amendment passed May 19, 1976, to Sections 367.019 and 367.020 of the 1960

Code of Ordinances and adding Section 367.55 thereto amended the 1976 Code which became effective on May 1, 1976.

Section 1.90 of the 1976 Code provides:

> "Ordinances passed after the effective date of *this* Code shall be passed as amendments to *this* Code * * *." (Underlining supplied)

The system of numbering the various sections in the 1976 Code was changed from the system used in 1960. There is no 367 series of numbers in the 1976 Code. However, a comparison of Sections 367.019 through 367.060 of the 1960 Code with Sections 267.1800 through 267.1870 of the 1976 Code discloses their sameness.

Section 3.160 of the 1976 Code provides:

> "The catchliness of the various sections of this Code printed in boldface type are intended to indicate the contents of the section for the convenience of the reader, but shall not be construed as a part of the section."

It is obvious that the intent of the Council was to amend the 1976 Code and the numbering system, as are the catchlines, is for the "convenience of the reader."

The amendment effectively amended Sections 267.1800 and 267.1820, repealed Section 267.1810 and added a Section (267.1855) to the 1976 Code.

The issue of the defendants' standing to question the constitutionality of the ordinance here in question, when the defendant has made no effort to comply with the ordinance, is well settled and the State does not argue otherwise.

Also well settled, which the defendants do not contest, is the constitutionality of the City's right to regulate, for

health, fire, safety and zoning purposes, the buildings in which motion picture theaters are housed, to require the licensing of the theaters as a means of implementing such regulation and to levy a fee for such license to defray the cost of inspections and regulations.

Defendant contends, however, that the Minneapolis Ordinance as amended goes beyond assuring that the buildings meet the standards and is in truth and fact an attempt to regulate the content of the film shown at the theater.

Defendant also contends that the license fee required by the ordinance is not reasonably related to the expense, to the City, in effectuating any necessary regulation but is so excessive as to constitute a tax on the exercise of defendants' First Amendment right of free speech.

The defendants' third contention is that the requirement of 267.1820 (The disclosure of the names and addresses of persons who will have charge, management, or control of the business or the premises) of the ordinance has a chilling effect on the exercise of his constitutional right of freedom of speech.

A person operating or conducting a motion picture theater is entitled to the protection of the First Amendment but is subject to regulation by the City. However, such regulation is subject to limitations which do not apply when such constitutional rights are not involved. The regulating authority must have a compelling governmental interest which requires the type or kind of regulation imposed. See *N.A.A.C.P. v. Button (1963) 371 U.S. 415, 438* and *Roth v. U.S. (1957) 354 U.S. 476, 77 S. Ct. 1304.*

While the ordinance under consideration does go beyond assuring that the building housing the theater meets Code requirements, it does not go beyond permissible limits. The

ordinance as amended sets forth two substantial reasons why the need of the public for a licensing procedure override and take priority over any infringement of the defendants' rights under the First Amendment.

Section 267.1830 of the ordinance, as a condition to obtaining and retaining of a license, requires an applicant to file with the City public liability insurance policy insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The licensing procedure is an effective method of assuring the public of such protection.

Section 267.1870 provides for the revocation of a license upon conviction of licensee or a licensee's principal employees of a violation of Section 617.291 through 617.297 of Minnesota Statutes, of Section 385.130 of the Minneapolis Ordinances, of a felony or gross misdemeanor involving moral turpitude and prohibits certain type advertising on the exterior of a theater. A review of the Roth decision (supra) and of *Redrup v. U.S. (1967) 386 U.S. 767, 87 S. Ct. 1414* discloses the constitutionality of these prohibitory laws.

The required license fee ranges from $86.00 for a theater of 400 seats in a residential area to $1,116.00 for a theater of over 2,000 seats in a business area. No explanation was offered by the State as to why the enforcement of the regulations by inspection or otherwise would vary dependent upon the location or size of the theater but such variation is immaterial. To hold otherwise would compel the Court to place a different value pon the right to freedom of speech depending upon where it occurred, in a residential or business area, in a large or small theater. The average annual fee required for a license is not unreasonable.

It may be that the disclosure of the names and addresses required by Section 267.1820 has a chilling effect upon such

person exercising their right of freedom of speech. It would also have a deterring effect upon a desire to violate the criminal laws referred to in Section 267.1870 of the ordinance. The latter overrides and takes priority over the former.

/s/ C. W. Sykora
C. W. Sykora
Judge of Municipal Court

Dated: At Minneapolis, Minn. this 22nd day of September, 1976.

APPENDIX C

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,
Plaintiff-Respondent,

49413 vs.

Jean L. Wernet,
Defendant-Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that inasmuch as the Hennepin County District Court, upon appeal, fully considered the constitutional issues sought raised by the party, the petition for permission to appeal filed on behalf of Jean L. Wernet be, and the same is, hereby denied.

Dated: 10/23/78 [BY THE COURT]

/s/
Chief Justice

Supreme Court
Filed Oct 24 1978
John McCarthy, Clerk

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota, Plaintiff-Respondent, vs.	*	Sup. Ct. File No. 49413, Henn. Cty. Mun. Ct. File No. 66894 Mun. Ct. File No. 403691
Jean L. Wernet, Defendant-Petitioner.	*	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: The Clerk of the Minnesota Supreme Court, the Hennepin County District Court, and the Hennepin County Municipal Court; and the above-named Plaintiff, and Ms. C. Lynne Fundingsland, Assistant City Attorney, A-1700 Hennepin County Government Center, Minneapolis, Minnesota 55487, its attorney:

PLEASE TAKE NOTICE that the above-named Defendant, by the undersigned, hereby appeals to the Supreme Court of the State of Minnesota, entered October 24, 1978, denying Defendant's Petition to appeal from the Hennepin County District Court decision of July 31, 1978, affirming Defendant's judgment of conviction in Hennepin County Municipal Court, for operating a motion picture theater without a license, in violation of Minneapolis Code of Ordinances Chapter 367.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Appellant
1108 West Broadway
Minneapolis, Minnesota 55411
Telephone: (612) 522-3359

Dated: January 16, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1979, a copy of the Notice of Appeal was mailed, postage prepaid, to Ms. C. Lynn Fundingsland, Assistant City Attorney, A-1700 Hennepin County Government Center, Minneapolis, Minnesota 55487, counsel for Respondent. I further certify that all parties required to be served have been served.

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Appellant
1108 West Broadway
Minneapolis, Minnesota
Telephone: (612) 522-3359

Sworn to and subscribed before me
this 17th day of January, 1979.

/s/ Jackie Cherryhomes
Notary Public

[CERTIFICATE OF SERVICE]

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

MUNICIPAL COURT
FIRST DIVISION,
MINNEAPOLIS

Wallace Cecil *being duly sworn makes complaint to the above named Court and says that he believes this information and other persons from whom it is obtained to be reliable and that probable cause exists to support a warrant of arrest for* Jean Louis Wernet
for the following reasons: Your complainant states that he is a Minneapolis Police Officer attached to the Vice Squad and that in the course of his duties he read and reviewed the report of Officer Schoeben concerning the arrest of Jean Wernet on June 7, 1976 for operating a theater without a license. Based on that report your complainant recites the following facts: that on June 7, 1976 at approximately 9:50 a.m. Officers Schoeben, Larson, and Jensen were in the vicinity of the Adonis Theater at 904 Hennepin Avenue in the City of Minneapolis and observed said theater to be open for business to the public. The officers knew that the theater had not been issued a license to operate. The officers entered and observed a party identified as Jean Louise Wernet, defendant herein, seated behind the ticket counter. After the defendant was advised of her rights, she stated to the officers that her employers told her that they could operate without a license.

OFFENSE

OPERATE THEATER WITHOUT LICENSE. 267.180.
Based upon the foregoing, complainant states that on the 7th day of June, 1976, within the corporate limits of the City of Minneapolis, Hennepin County, Minnesota, Jean Louise Wernet, then and there being the person having the

custody and control and in charge of that certain movie theater commonly known and designated as the Adonis, located at 904 Hennepin Avenue in the City of Minneapolis, did then and there operate the said movie theater without being issued a license from the City Clerk of the City of Minneapolis to so do.

contrary to the Ordinance in such case made and provided and against the peace and dignity of the State of Minnesota.

Wherefore, complainant prays that said offender may be arrested and dealt with according to law.

/s/ Wallace Cecil

Sworn to and subscribed and complained of before me this 23 day of June A.D. 1976.

Section 267.180
Charge OPERATE THEATER WITHOUT LICENSE

/s/ E. P. Chapman, Judge
Edwin P. Chapman, Judge
Judge of Municipal Court

/s/ Edward A. Backstrom
City Attorney

Recommended Bail _____

Witnesses Examined by Magistrate:

_____

APPENDIX E

Constitutional, Statutory and Municipal Ordinance Material

AMENDMENT I, United States Constitution

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV, United States Constitution

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute §617.291

Subdivision 1. In enacting sections 617.291 to 617.297 the legislature declares its purpose and intent to be as follows:

There exists an urgent need to prevent commercial exposure of minors to sexually provocative written, photographic, printed, sound or published materials as these are hereafter defined in sections 617.291 to 617.297 and which are hereby declared to be harmful to minors.

Subdivision 2. It is in the best interest of the health, welfare and safety of the citizens of this state, and especially of minors within the state, that commercial dissemi-

nation of such sexually provocative written, photographic, printed sound or published materials deemed harmful to minors be restricted to persons over the age of 17 years; or, if available to minors under the age of 18 years, that the availability of such materials be restricted to sources within established and recognized schools, churches, museums, medical clinics and physicians, hospitals, public libraries, or government sponsored organizations.

§617.292 Definitions

Subdivision 1. As used in 617.291 to 617.297 the terms defined in this section have the meanings given them.

Subd. 2. "Minor" means any person under the age of 18 years.

Subd. 3. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

Subd. 4. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's unclothed genitals, pubic area, buttocks, or, if such person be female, her breast.

Subd. 5. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

Subd. 6. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clotheed.

Subd. 7. "Harmful to minors" means the quality of any descriptionor representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(1) Predominantly appeals to the prurient, shameful or morbid interest of minors, and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(3) is utterly without redeeming social importance for minors.

Subd. 8. "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(1) the character and content of any material which is reasonably susceptible of examination by the defendant, and

(2) the age of the minor, provided however that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

617.293 Harmful materials; dissemination to minors prohibited

It is unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any mat-

ter enumerated in clause (a), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse which, taken as a whole, is harmful to minors.

617.294 Comercial exhibition prohibited

It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, or, sadomasochistic abuse and which is harmful to minors.

617.295 Exemptions

The following are exemptions from criminal or other action hereunder:

(a) Recognized and established schools, churches, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies or quasi-governmental sponsored organizations, and persons acting in their capacity as employees or agents of such organization. For the purpose of this section "recognized and established" shall mean an organization or agency having a full time faculty and diversified curriculum in the case of a school; a church affiliated with a national or regional denomination; a licensed physician or psychiatrist or clinic of licensed physicians or psychiatrist; and in all other exempt organizations shall refer only to income tax exempted organizations which are supported in whole or in part by tax funds or which receive at least one third of their support from publicly donated funds.

(b) Individuals in a parental relationship with the minor.

(c) Motion picture machine operators, stagehands, or other theater employees such as cashiers, doormen, ushers, and concession employees, if such person or persons have no financial interest in the entertainment presented other than the salary or wage, or in any theater or place where such employee has no financial interest when his services are obtained solely for salary or wage; provided that such employee is under the direct supervision of a theater manager who is a resident of the state and who is not exempt from action under sections 617.291 to 617.297.

617.296 Penalties; injunctive remedies

Subdivision 1. A violation of any provision of sections 617.291 to 617.297 shall constitute a gross misdemeanor.

Subd. 2. Whenever any county attorney, or the attorney general of this state, has reasonable cause to believe that any person within this state is violating sections 617.291 to 617.-297, he may by verified petition seek a temporary restraining order or temporary injunction in the district court in the county in which the alleged violation occurred. No temporary restraining order or preliminary injunction shall be issued without a prior show cause notice of hearing to the respondents named in the petition, and an opportunity for the respondents to be heard. Personal service of the show cause order and of the petition made as in civil actions on the named respondents, or upon any of their employees or agents found within the state, shall constitute sufficient notice. Such show cause order for hearing may be returnable on the third day from the date of service as to a respondent who is present in this state, and on the fifth day as to a person not a resident or not found within this state.

§617.297 Evidence of adherence to motion picture rating system

In any proceeding or prosecution involving the exhibitor or owner of any motion picture theater, evidence of compliance or noncompliance with and adherence to a rating system recognized in the motion picture industry is admissible.

Minneapolis City Ordinance §870.080

It is unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish, distribute, or attempt to distribute, any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statute, drawing, or other article which is obscene. "Obscene" for the purpose of this section is defined as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.